

FILED

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYDIA JANETH GARCIA-HERRERA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-70413

Agency No. A75-752-037

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER and BYBEE, Circuit Judges.

Lydia Janeth Garcia-Herrera, a native and citizen of Mexico, petitions for review of an order of the Board of Immigration Appeals (“BIA”) denying her

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

motion to reopen. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the denial of a motion to reopen for abuse of discretion, *Barroso v. Gonzales*, 429 F.3d 1195, 1200 (9th Cir. 2005), and we grant the petition for review.

Garcia-Herrera filed a timely motion to reopen within her voluntary departure period. The BIA denied the motion to reopen solely on the ground that Garcia-Herrera failed to depart within her voluntary departure period. This court recently held that a timely-filed motion to reopen automatically tolls the voluntary departure period. *See id.* at 1205. Accordingly, we grant the petition for review and remand for the BIA to consider the merits of Garcia-Herrera's motion to reopen. *See INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

PETITION FOR REVIEW GRANTED